



DEC 21 2004

Reply to

SP 05-10

Attn. of: CACFP-746

SFSP-509

Subject: Revised Rules on Nonprocurement Suspension/Debarment and Drug Free
Workplace Requirements

To: STATE AGENCY DIRECTORS - Colorado ED, Colorado DPHE, Colorado HS,
(Special Nutrition Programs) Iowa, Kansas, Missouri ED, Missouri DH,
Montana OPI, Montana DPHHS, Nebraska
Nebraska SS, North Dakota, South Dakota,
Utah, Wyoming ED

The attached document provides guidance on the new government-wide suspension/debarment and Drug Free Workplace (DFW) rules. The principal changes to these rules are:

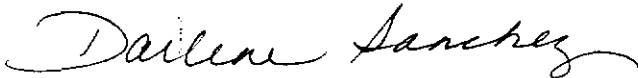
1. USDA continues to codify the suspension/debarment rules at 7 CFR Part 3017 but has codified the DFW rules separately, at 7 CFR Part 3021.
2. Transactions subject to the suspension/debarment rules (covered transactions) now include grants, subgrants, cooperative agreements, and prime contracts under such awards. Subcontracts are no longer covered.
3. The dollar threshold for covered procurement contracts has been lowered from \$100,000 to \$25,000. Contracts for federally required audit services remain covered regardless of dollar amount.
4. The government-wide suspension/debarment certification form has been abolished, and the collection of such certifications is no longer mandatory. The new rules provide grantees and subgrantees with three options for obtaining satisfaction that prospective subgrantees and contractors are not suspended, debarred, or disqualified. These options are spelled out in the attached guidance.
5. The title of the list of suspended, debarred, and disqualified parties has been changed to Excluded Parties List System (EPLS). It is now available electronically, at a site given in the attached guidance.

6. The DFW certification requirement has been abolished. However, DFW compliance requirements continue to apply.

Statements of the new rules are printed in bold in the attached guidance.

Paper copies of 7 CFR Parts 3017 and 3021 are also attached.

If you have any questions concerning the new rules, please call my staff at (303) 844-0354.



DARLENE SANCHEZ
Regional Director
Special Nutrition Programs

Attachments

REVISED NONPROCUREMENT SUSPENSION/DEBARMENT RULES

The November 26, 2003 *Federal Register* contained a Notice revising the government-wide suspension/debarment and Drug-Free Workplace (DFW) rules (68 FR 66534). This Notice finalized the proposed rules published January 23, 2002 (67 FR 3266). The new rules took effect on the date they were published. The following material compares and contrasts the principal features of the new and old rules of interest to FNS and its grantees.

I. Organization.

The November 26, 2003 *Federal Register* Notice first gives the government-wide suspension/debarment language, which it follows with separate government-wide Drug-Free Workplace (DFW) language. Each Federal grant-making agency's agency-specific clarifications, exceptions, and other "tweaks" follow the government-wide text.

USDA has codified the new suspension/debarment rules at 7 CFR Part 3017 and the new DFW rules at 7 CFR Part 3021. USDA's "tweaks" begin on page 66562. Unlike most agencies, USDA codified the new rule on an interim final basis. This is because USDA's "tweaks" to the general rule included agency-specific guidance on appealing suspension and debarment actions (7 CFR sec. 3017.765 and 3017.890, respectively); the Department sought comments on these passages.

The provisions of the suspension/debarment and DFW rules have been physically re-arranged. The suspension/debarment responsibilities of grantees and other "participants" are now set out in Subpart C of Part 3017, while those of FNS and other Federal agencies are presented in Subpart D. One must now look to Subpart I for definitions. The preamble to the proposed rule included tables that relate each section of the new rules to its counterpart in the old rules (or indicates that the provision is new and has no such counterpart). These tables may be found at 67 FR 3267 for suspension/debarment and at 67 FR 3271 for DFW. The preamble to the final rule identifies departures from these tables resulting from differences between the proposed and final rules.

The new rules are expressed in the new "plain English" question-and-answer format.

As always, the preamble gives an analysis of the comments received on the proposed rule. In addition, it discusses the Government's rationale for many of the policies adopted in the new rules as well as those retained from the old. We therefore recommend that users study the preamble as well as the regulatory text.

II. Key Terms.

A. **Excluded vs. Disqualified.**

The new rules are couched in terms of a dichotomy between "excluded" and "disqualified" entities. An entity is "excluded" if it has been suspended or

debarred under the government-wide suspension/debarment rules. Suspension and debarment are discretionary actions that an agency takes to protect the public interest. On the other hand, a "disqualified" entity is one that has been denied participation in certain Federal programs under a specific statute or executive order administered by the disqualifying agency. For example, 10 USC 983 requires the Defense Department to disqualify a university from eligibility for grants and contracts funded by certain appropriations if the university has been found to have denied military recruiters access to its campus or refused to permit the ROTC to operate there. "Excluded" and "disqualified" entities are referred to collectively as "ineligible" entities. An ineligible entity is banned from participation in a covered transaction. (7 CFR sec. 3017.75, 3017.940, 3017.945, 3017.960)

B. Covered Transactions.

The new rules define covered transactions at 7 CFR sec. 3017.210 and 3017.220(b). They also present a graphic illustration of covered transaction relationships at 68 FR 66557. The principal provisions of interest to FNS are summarized below.

1. What Covered Transactions Do Include:

a. Nonprocurement Transactions:

Unless expressly exempted by 7 CFR sec. 3017.215, the award of any grant, subgrant, or cooperative agreement is a covered transaction.

b. Procurement Transactions:

- (1) Any contract awarded by a grantees or subgrantee for federally-required audit services, regardless of dollar amount, is a covered transaction. This provision remains unchanged from the old rules.
- (2) Any other procurement contract expected to equal or exceed \$25,000, awarded by a grantee or subgrantee under its grant or subgrant, is a covered transaction. This contrasts with the old rules, which pegged the procurement coverage threshold to the Federal small purchase threshold (currently \$100,000).

2. What Covered Transactions Do Not Include:

a. Subcontracts. Subcontracts awarded by the grantee's or subgrantee's prime contractor, or by a subcontractor at any tier, are not covered transactions unless a Federal agency's agency-specific "tweaks" to the general rules designate them as such. A Federal grant-making agency may elect to set a threshold higher than \$25,000 for use in its programs or extend coverage to lower tier procurement contracts, but USDA has not included such provisions in its "tweaks." This contrasts with the old rules, which treated all subcontracts as covered transactions but which USDA had "tweaked" for FNS programs by excluding subcontracts below the first tier subcontract under a prime contract. The Federal Government's rationale for this policy shift is set out in the preamble under the heading *Optional lower tier coverage*, beginning on page 66536 of the November 26, 2003 *Federal Register* Notice.

b. Statutory Entitlement and Mandatory Awards. Covered transactions do not include entitlement or mandatory awards at any tier if these are required by statute (7 CFR sec. 3017.215(h)). This passage in the new rules lacks the old rules' clarity that subgrants under entitlement or mandatory grants are covered transactions unless they are themselves entitlement or mandatory. For example, a National School Lunch Program (NSLP) grant to a State educational agency and a WIC grant to a State health agency are both mandatory awards, but both are not mandatory at the subgrantee level. Specifically:

(1) The State educational agency is required to make the NSLP available to any organization that applies if that organization meets the regulatory definition of "school." Therefore, NSLP subgrants to school food authorities are statutory entitlements, excluded from coverage under the suspension/debarment rules.

(2) Program regulations at 7 CFR sec. 246.5 give the State health agency considerable latitude in selecting WIC local agencies so long as the outcome gives the State's WIC-eligible population access to the program. A WIC subgrant is thus a discretionary award subject to the suspension/debarment rules.

c. Retailer Authorizations. The authorization of a retailer to participate in the FSP or WIC is not a covered transaction, because alternative program-specific processes exist to protect the public interest against retailer malfeasance. For the same reason, the suspension/debarment rules do not apply to authorizing FMNP

roadside stands. These program-specific processes are described at 7 CFR sec. 278.1(k) for the FSP, 246.12(g)(3)(iii) and 246.12(l) for WIC, and 248.10(a)(2) and 248.10(k) for the FMNP. This was our interpretation of the old rules, and it remains unchanged under the new rules.

C. Excluded Parties List System.

The new rules change the title of the GSA list of parties excluded or disqualified from engaging in covered transactions from "List of Parties Excluded or Disqualified From Federal Procurement and Nonprocurement Programs" to "Excluded Parties List System" (EPLS) (7 CFR Part 3017, Subpart E and sec. 3017.950).

The EPLS is available on the Internet, currently at <http://epls.arnet.gov>. Cause and treatment codes identify the reason for an entity's exclusion or disqualification and the specific restrictions to which the entity is subject while in excluded or disqualified status (7 CFR sec. 3017.530).

III. Responsibilities.

A. Engaging in Covered Transactions.

As with the old rules, FNS must obtain satisfaction that a non-federal entity is neither excluded nor disqualified before engaging that entity in a covered transaction. Grantees and subgrantees must do likewise. This is a reciprocal process; the awarding agency must apply due diligence to determining the applicant's eligibility; and the applicant or awardee must furnish information about itself and its principals in good faith.

However, the new rules differ dramatically from the old regarding acceptable methods of obtaining satisfaction. The uniform Federal suspension/debarment certification form has been abolished, and the collection of paper certifications is no longer mandatory. New rules provide greater flexibility in meeting the requirement.

1. State Agencies and Other Non-Federal Entities may meet the requirement by any one of three methods spelled out at 7 CFR sec. 3017.300. They are:
 - a. Checking the EPLS.
 - b. Collecting a certification that the entity is neither excluded nor disqualified. Since a Federal certification form is no longer available, a State or local agency electing this method must devise its own.

- c. Including a clause to this effect in the subgrant agreement or procurement contract.
2. **FNS** must meet the requirement by doing both of the following:
 - a. Checking the EPLS. (7 CFR sec. 3017.430(a)); and
 - b. Reviewing information furnished by the applicant under 7 CFR sec. 3017.335. (7 CFR sec. 3017.430(b))

The rationale for these procedural revisions is that technological advances have outstripped the procedures described in the old rules. Unlike the old paper GSA List, which could be weeks out-of-date by the time a user needed to consult it, the electronic EPLS is updated daily. A Federal, State, or local agency can instantly check the EPLS to determine whether an entity being considered for a covered transaction is excluded or disqualified. This makes the collection of paper certifications obsolete.

The new rules retain the existing policy that a covered transaction already in effect at the time a party to that transaction is identified as excluded or disqualified need not be terminated (7 CFR sec. 3017.310).

B. Overseeing Compliance by Grantees, Subgrantees, and Contractors.

FNS must require State agencies and other primary grantees to comply with the suspension/debarment rules. We must include in Federal-State Agreements and other grant agreements a term or condition committing the grantee to comply (7 CFR sec. 3017.435 and 3017.440).

Primary grantees, in turn, must require their subgrantees to comply. Both primary grantees and subgrantees must require their procurement contractors to comply as well. Although the contractors are not required to obtain satisfaction that their subcontractors are eligible, they must provide whatever information or assurances about themselves and their principals that their grantee or subgrantee customers require (7 CFR sec. 3017.330).

C. Listing Excluded and Disqualified Entities.

Excluding a non-federal entity is a discretionary action that FNS may take when deemed necessary to protect the public interest. Taking such action requires posting information about the excluded entity in EPLS (7 CFR sec. 3017.100, 3017.110, and 3017.140).

The Federal official who takes action to exclude an entity must notify that entity. **The new rules expand authorized notification media to include data-fax and e-mail** (7 CFR sec. 3017.615 and 3017.975).

IV. Drug-Free Workplace Rules.

The new rule abolishes the requirement to collect DFW certifications from grantees, but continues to impose DFW compliance requirements on them. As a condition of receiving a Federal award, a State agency or other primary grantee must: (A) make a good-faith effort, on a continuing basis, to maintain a DFW (including taking specific actions described at 7 CFR sec. 3021.200 through 3021.230); and (B) identify all workplace locations where work under the Federal award will be performed (7 CFR sec. 3021.200).

V. Implementation.

A. FNS must:

1. Make conforming changes to program regulations, Federal-State Agreements, other grant agreements, Instructions, and other guidance and policy statements.
2. Notify State agencies and other primary grantees of the new rules.
3. Incorporate the new rules into their monitoring of State agencies and other grantees.

B. State agencies must:

1. Make conforming changes to their internal procedures, subgrant agreements, directives, training materials, etc.
2. Notify their subgrantees and contractors of the new rules.
3. Incorporate the new rules into their subgrantee monitoring.

**PART 3017—GOVERNMENTWIDE
DEBARMENT AND SUSPENSION
(NONPROCUREMENT)**

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3327 (31 U.S.C. 6101 note), E.O. 12519 (3 CFR 1986 Comp., p. 189); E.O. 12698 (3 CFR 1986 Comp., p. 235); 7 CFR 2.28

SOURCE: 68 FR 66544, 66563, Nov. 26, 2003, unless otherwise noted.

Subpart J [Reserved]

§ 3017.25 How is this part organized?

APPENDIX TO PART 3017—COVERED TRANSACTIONS

AUTHORITY: 5 U.S.C. 301; Pub. L. 101-576, 104 Stat. 2838; Sec. 2455, Pub. L. 103-355, 108 Stat.

(a) This part is subdivided into ten subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities, as shown in the following table:

In subpart	You will find provisions related to
A	general information about this rule
B	the types of Department of Agriculture transactions that are covered by the Governmentwide non-procurement suspension and debarment system
C	the responsibilities of persons who participate in covered transactions
D	the responsibilities of Department of Agriculture officials who are authorized to enter into covered transactions
E	the responsibilities of Federal agencies for the Excluded Parties List System (Disseminated by the General Services Administration)
F	the general principles governing suspension, debarment, voluntary exclusion and settlement
G	suspension actions
H	debarment actions
I	definitions of terms used in this part
J	[Reserved]

(b) The following table shows which subparts may be of special interest to you, depending on who you are:

If you are	See subpart(s)
(1) a participant or principal in a non-procurement transaction.	A, B, C, and I
(2) a respondent in a suspension action	A, B, F, G and I
(3) a respondent in a debarment action	A, B, F, H and I
(4) a suspending official	A, B, D, E, F, G and I
(5) a debarring official	A, B, D, E, F, H and I
(6) a (n) Department of Agriculture official authorized to enter into a covered transaction.	A, B, D, E and I
(7) Reserved	J.

the Department of Agriculture enforces an exclusion under this part. However, this diagram shows only the general model for the levels or "tiers" at which the Department of Agriculture enforces an exclusion under this part, and the model will vary for certain categories of transactions in accordance with the exclusions from covered transactions in § 3017.215 and § 3017.220.

[68 FR 66544, 66563, Nov. 26, 2003, as amended at 68 FR 66564, Nov. 26, 2003]

§ 3017.75 Do terms in this part have special meanings?

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart I of this part. For example, three important terms are—

(a) *Exclusion or excluded*, which refers only to discretionary actions taken by a suspending or debarring official under this part or the Federal Acquisition Regulation (48 CFR part 9, subpart 9.4).

(b) *Disqualification or disqualified*, which refers to prohibitions under specific statutes, executive orders (other than Executive Order 12549 and Executive Order 12689), or other authorities. Disqualifications frequently are not

§ 3017.50 How is this part written?

(a) This part uses a "plain language" format to make it easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Pronouns used within this part, such as "I" and "you," change from subpart to subpart depending on the audience being addressed. The pronoun "we" always is the Department of Agriculture.

(c) The "Covered Transactions" diagram in the appendix to this part shows the levels or "tiers" at which

subject to the discretion of an agency official, may have a different scope than exclusions, or have special conditions that apply to the disqualification; and

(c) *Ineligibility or ineligible*, which generally refers to a person who is either excluded or disqualified

Subpart A—General

§ 3017.100 What does this part do?

This part adopts a governmentwide system of debarment and suspension for Department of Agriculture non-procurement activities. It also provides for reciprocal exclusion of persons who have been excluded under the Federal Acquisition Regulation, and provides for the consolidated listing of all persons who are excluded, or disqualified by statute, executive order, or other legal authority. This part satisfies the requirements in section 3 of Executive Order 12549, "Debarment and Suspension" (3 CFR 1986 Comp., p. 189), Executive Order 12689, "Debarment and Suspension" (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Public Law 103-355, 108 Stat. 3327).

§ 3017.105 Does this part apply to me?

Portions of this part (see table at § 3017.25(b)) apply to you if you are a(n)–

(a) Person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction;

(b) Respondent (a person against whom the Department of Agriculture has initiated a debarment or suspension action);

(c) Department of Agriculture debarring or suspending official; or

(d) Department of Agriculture official who is authorized to enter into covered transactions with non-Federal parties.

§ 3017.110 What is the purpose of the nonprocurement debarment and suspension system?

(a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.

(b) A Federal agency uses the non-procurement debarment and suspension

system to exclude from Federal programs persons who are not presently responsible

(c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment.

§ 3017.115 How does an exclusion restrict a person's involvement in covered transactions?

With the exceptions stated in §§ 3017.120, 3017.315, and 3017.420, a person who is excluded by the Department of Agriculture or any other Federal agency may not:

(a) Be a participant in a(n) Department of Agriculture transaction that is a covered transaction under subpart B of this part;

(b) Be a participant in a transaction of any other Federal agency that is a covered transaction under that agency's regulation for debarment and suspension; or

(c) Act as a principal of a person participating in one of those covered transactions.

§ 3017.120 May we grant an exception to let an excluded person participate in a covered transaction?

(a) The the Secretary of Agriculture or designee may grant an exception permitting an excluded person to participate in a particular covered transaction. If the the Secretary of Agriculture or designee grants an exception, the exception must be in writing and state the reason(s) for deviating from the governmentwide policy in Executive Order 12549

(b) An exception granted by one agency for an excluded person does not extend to the covered transactions of another agency.

§ 3017.125 Does an exclusion under the nonprocurement system affect a person's eligibility for Federal procurement contracts?

If any Federal agency excludes a person under its nonprocurement common rule on or after August 25, 1995, the excluded person is also ineligible to participate in Federal procurement transactions under the FAR. Therefore, an

exclusion under this part has reciprocal effect in Federal procurement transactions

§ 3017.130 Does exclusion under the Federal procurement system affect a person's eligibility to participate in nonprocurement transactions?

If any Federal agency excludes a person under the FAR on or after August 25, 1995, the excluded person is also ineligible to participate in nonprocurement covered transactions under this part. Therefore, an exclusion under the FAR has reciprocal effect in Federal nonprocurement transactions.

§ 3017.135 May the Department of Agriculture exclude a person who is not currently participating in a nonprocurement transaction?

Given a cause that justifies an exclusion under this part, we may exclude any person who has been involved, is currently involved, or may reasonably be expected to be involved in a covered transaction

§ 3017.140 How do I know if a person is excluded?

Check the *Excluded Parties List System (EPLS)* to determine whether a person is excluded. The General Services Administration (GSA) maintains the *EPLS* and makes it available, as detailed in subpart E of this part. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

§ 3017.145 Does this part address persons who are disqualified, as well as those who are excluded from nonprocurement transactions?

Except if provided for in Subpart J of this part, this part—

(a) Addresses disqualified persons only to—

(1) Provide for their inclusion in the *EPLS*; and

(2) State responsibilities of Federal agencies and participants to check for disqualified persons before entering into covered transactions.

(b) Does not specify the—

(1) Department of Agriculture transactions for which a disqualified person

is ineligible. Those transactions vary on a case-by-case basis, because they depend on the language of the specific statute, Executive order, or regulation that caused the disqualification.

(2) Entities to which the disqualification applies; or

(3) Process that the agency uses to disqualify a person. Unlike exclusion, disqualification is frequently not a discretionary action that a Federal agency takes.

Subpart B—Covered Transactions

§ 3017.200 What is a covered transaction?

A covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of this part. It may be a transaction at—

(a) The primary tier, between a Federal agency and a person (see appendix to this part); or

(b) A lower tier, between a participant in a covered transaction and another person.

§ 3017.205 Why is it important if a particular transaction is a covered transaction?

The importance of a covered transaction depends upon who you are.

(a) As a participant in the transaction, you have the responsibilities laid out in Subpart C of this part. Those include responsibilities to the person or Federal agency at the next higher tier from whom you received the transaction, if any. They also include responsibilities if you subsequently enter into other covered transactions with persons at the next lower tier.

(b) As a Federal official who enters into a primary tier transaction, you have the responsibilities laid out in subpart D of this part.

(c) As an excluded person, you may not be a participant or principal in the transaction unless—

(1) The person who entered into the transaction with you allows you to continue your involvement in a transaction that predates your exclusion, as permitted under § 3017.310 or § 3017.415; or

(2) A(n) Department of Agriculture official obtains an exception from the the Secretary of Agriculture or designee to allow you to be involved in the transaction, as permitted under § 3017.120.

§ 3017.210 Which nonprocurement transactions are covered transactions?

All nonprocurement transactions, as defined in § 3017.970, are covered transactions unless listed in § 3017.215. (See appendix to this part.)

§ 3017.215 Which nonprocurement transactions are not covered transactions?

The following types of nonprocurement transactions are not covered transactions:

- (a) A direct award to—
 - (1) A foreign government or foreign governmental entity;
 - (2) A public international organization;
 - (3) An entity owned (in whole or in part) or controlled by a foreign government; or
 - (4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.
- (b) A benefit to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted). For example, if a person receives social security benefits under the Supplemental Security Income provisions of the Social Security Act, 42 U.S.C. 1301 et seq., those benefits are not covered transactions and, therefore, are not affected if the person is excluded.
- (c) Federal employment.
- (d) A transaction that the Department of Agriculture needs to respond to a national or agency-recognized emergency or disaster.
- (e) A permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment, unless the Department of Agriculture specifically designates it to be a covered transaction.
- (f) An incidental benefit that results from ordinary governmental operations.

(g) Any other transaction if the application of an exclusion to the transaction is prohibited by law.

(h) An entitlement or mandatory award required by a statute, including a lower tier entitlement or mandatory award that is required by a statute.

(i) With respect to the Department of Agriculture's export and foreign assistance programs, any transaction below the primary tier covered transaction other than a nonprocurement transaction under the Market Access Program between a nonprofit trade association or state regional group and a U.S. entity, as defined in part 1485 of this title.

(j) Any transaction under the Department of Agriculture's conservation programs, warehouse licensing programs, or programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities.

(k) The export or substitution of Federal timber governed by the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620 et seq. (The "Export Act"), which provides separate statutory authority to debar.

(l) The receipt of licenses, permits, certificates, and indemnification under regulatory programs conducted in the interest of public health and safety, and animal and plant health and safety.

(m) The receipt of official grading and inspection services, animal damage control services, public health and safety inspection services, and animal and plant health and safety inspection services.

(n) If the person is a State or local government, the provision of official grading and inspection services, animal damage control services, animal and plant health and safety inspection services.

(o) The receipt of licenses, permit, or certificates under regulatory programs conducted in the interest of ensuring fair trade practices.

(p) Permits, licenses, exchanges and other acquisitions of real property, rights of way, and easements under

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natural resource management programs.

[68 FR 66544, 66563, Nov. 26, 2003, as amended at 68 FR 66564, Nov. 26, 2003]

§ 3017.220 Are any procurement contracts included as covered transactions?

(a) Covered transactions under this part—

(1) Do not include any procurement contracts awarded directly by a Federal agency but

(2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions (see appendix to this part).

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

(1) The contract is awarded by a participant in a nonprocurement transaction that is covered under § 3017.210, and the amount of the contract is expected to equal or exceed \$25,000.

(2) The contract requires the consent of a(n) Department of Agriculture official. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(3) The contract is for federally-required audit services.

(c) A contract for the procurement of ocean transportation in connection with the Department of Agriculture's foreign assistance programs is a covered transaction. With respect to the Department of Agriculture's export and foreign assistance programs, such contracts are the only procurement contracts included as covered transactions, notwithstanding the provisions in paragraphs (a) and (b) of this section.

[68 FR 66544, 66563, Nov. 26, 2003, as amended at 68 FR 66564, Nov. 26, 2003]

§ 3017.225 How do I know if a transaction in which I may participate is a covered transaction?

As a participant in a transaction, you will know that it is a covered transaction because the agency regula-

tions governing the transaction, the appropriate agency official, or participant at the next higher tier who enters into the transaction with you, will tell you that you must comply with applicable portions of this part.

Subpart C—Responsibilities of Participants Regarding Transactions

DOING BUSINESS WITH OTHER PERSONS

§ 3017.300 What must I do before I enter into a covered transaction with another person at the next lower tier?

When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by:

(a) Checking the EPLS; or

(b) Collecting a certification from that person if allowed by this rule; or

(c) Adding a clause or condition to the covered transaction with that person.

§ 3017.305 May I enter into a covered transaction with an excluded or disqualified person?

(a) You as a participant may not enter into a covered transaction with an excluded person, unless the Department of Agriculture grants an exception under § 3017.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you have obtained an exception under the disqualifying statute, Executive order, or regulation.

§ 3017.310 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?

(a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a

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thorough review to ensure that the action is proper and appropriate.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the Department of Agriculture grants an exception under § 3017.120.

§ 3017.315 May I use the services of an excluded person as a principal under a covered transaction?

(a) You as a participant may continue to use the services of an excluded person as a principal under a covered transaction if you were using the services of that person in the transaction before the person was excluded. However, you are not required to continue using that person's services as a principal. You should make a decision about whether to discontinue that person's services only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not begin to use the services of an excluded person as a principal under a covered transaction unless the Department of Agriculture grants an exception under § 3017.120.

§ 3017.320 Must I verify that principals of my covered transactions are eligible to participate?

Yes, you as a participant are responsible for determining whether any of your principals of your covered transactions is excluded or disqualified from participating in the transaction. You may decide the method and frequency by which you do so. You may, but you are not required to, check the *EPLS*.

§ 3017.325 What happens if I do business with an excluded person in a covered transaction?

If as a participant you knowingly do business with an excluded person, we may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

§ 3017.330 What requirements must I pass down to persons at lower tiers with whom I intend to do business?

Before entering into a covered transaction with a participant at the next lower tier, you must require that participant to—

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(a) Comply with this subpart as a condition of participation in the transaction. You may do so using any method(s), unless § 3017.440 requires you to use specific methods.

(b) Pass the requirement to comply with this subpart to each person with whom the participant enters into a covered transaction at the next lower tier.

DISCLOSING INFORMATION—PRIMARY TIER PARTICIPANTS

§ 3017.335 What information must I provide before entering into a covered transaction with the Department of Agriculture?

Before you enter into a covered transaction at the primary tier, you as the participant must notify the Department of Agriculture office that is entering into the transaction with you, if you know that you or any of the principals for that covered transaction:

(a) Are presently excluded or disqualified;

(b) Have been convicted within the preceding three years of any of the offenses listed in § 3017.800(a) or had a civil judgment rendered against you for one of those offenses within that time period;

(c) Are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in § 3017.800(a); or

(d) Have had one or more public transactions (Federal, State, or local) terminated within the preceding three years for cause or default.

§ 3017.340 If I disclose unfavorable information required under § 3017.335, will I be prevented from participating in the transaction?

As a primary tier participant, your disclosure of unfavorable information about yourself or a principal under § 3017.335 will not necessarily cause us to deny your participation in the covered transaction. We will consider the information when we determine whether to enter into the covered transaction. We also will consider any additional information or explanation that you elect to submit with the disclosed information.

§ 3017.345 What happens if I fail to disclose information required under § 3017.335?

If we later determine that you failed to disclose information under § 3017.335 that you knew at the time you entered into the covered transaction, we may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

§ 3017.350 What must I do if I learn of information required under § 3017.335 after entering into a covered transaction with the Department of Agriculture?

At any time after you enter into a covered transaction, you must give immediate written notice to the Department of Agriculture office with which you entered into the transaction if you learn either that—

(a) You failed to disclose information earlier, as required by § 3017.335; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 3017.335.

DISCLOSING INFORMATION—LOWER TIER PARTICIPANTS**§ 3017.355 What information must I provide to a higher tier participant before entering into a covered transaction with that participant?**

Before you enter into a covered transaction with a person at the next higher tier, you as a lower tier participant must notify that person if you know that you or any of the principals are presently excluded or disqualified.

§ 3017.360 What happens if I fail to disclose the information required under § 3017.355?

If we later determine that you failed to tell the person at the higher tier that you were excluded or disqualified at the time you entered into the covered transaction with that person, we may pursue any available remedies, including suspension and debarment.

§ 3017.365 What must I do if I learn of information required under § 3017.355 after entering into a covered transaction with a higher tier participant?

At any time after you enter into a lower tier covered transaction with a person at a higher tier, you must provide immediate written notice to that person if you learn either that—

(a) You failed to disclose information earlier, as required by § 3017.355; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 3017.355.

Subpart D—Responsibilities of Department of Agriculture Officials Regarding Transactions**§ 3017.400 May I enter into a transaction with an excluded or disqualified person?**

(a) You as an agency official may not enter into a covered transaction with an excluded person unless you obtain an exception under § 3017.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

§ 3017.405 May I enter into a covered transaction with a participant if a principal of the transaction is excluded?

As an agency official, you may not enter into a covered transaction with a participant if you know that a principal of the transaction is excluded, unless you obtain an exception under § 3017.120.

§ 3017.410 May I approve a participant's use of the services of an excluded person?

After entering into a covered transaction with a participant, you as an agency official may not approve a participant's use of an excluded person as a principal under that transaction, unless you obtain an exception under § 3017.120.

§ 3017.415

§ 3017.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?

(a) You as an agency official may continue covered transactions with an excluded person, or under which an excluded person is a principal, if the transactions were in existence when the person was excluded. You are not required to continue the transactions, however, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, or under which an excluded person is a principal, unless you obtain an exception under § 3017.120.

§ 3017.420 May I approve a transaction with an excluded or disqualified person at a lower tier?

If a transaction at a lower tier is subject to your approval, you as an agency official may not approve—

(a) A covered transaction with a person who is currently excluded, unless you obtain an exception under § 3017.120; or

(b) A transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

§ 3017.425 When do I check to see if a person is excluded or disqualified?

As an agency official, you must check to see if a person is excluded or disqualified before you—

(a) Enter into a primary tier covered transaction;

(b) Approve a principal in a primary tier covered transaction;

(c) Approve a lower tier participant if agency approval of the lower tier participant is required; or

(d) Approve a principal in connection with a lower tier transaction if agency approval of the principal is required

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§ 3017.430 How do I check to see if a person is excluded or disqualified?

You check to see if a person is excluded or disqualified in two ways

(a) You as an agency official must check the *EPLS* when you take any action listed in § 3017.425.

(b) You must review information that a participant gives you, as required by § 3017.335, about its status or the status of the principals of a transaction.

§ 3017.435 What must I require of a primary tier participant?

You as an agency official must require each participant in a primary tier covered transaction to—

(a) Comply with subpart C of this part as a condition of participation in the transaction; and

(b) Communicate the requirement to comply with Subpart C of this part to persons at the next lower tier with whom the primary tier participant enters into covered transactions.

§ 3017.440 What method do I use to communicate those requirements to participants?

To communicate the requirement, you must include a term or condition in the transaction requiring the participants' compliance with subpart C of this part and requiring them to include a similar term or condition in their lower-tier covered transactions.

[68 FR 66565, Nov. 26, 2003]

§ 3017.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?

If a participant knowingly does business with an excluded or disqualified person, you as an agency official may refer the matter for suspension and debarment consideration. You may also disallow costs, annul or terminate the transaction, issue a stop work order, or take any other appropriate remedy.

§ 3017.450 What action may I take if a primary tier participant fails to disclose the information required under § 3017.335?

If you as an agency official determine that a participant failed to disclose information, as required by § 3017.335, at the time it entered into a

covered transaction with you, you may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

§ 3017.455 What may I do if a lower tier participant fails to disclose the information required under § 3017.355 to the next higher tier?

If you as an agency official determine that a lower tier participant failed to disclose information, as required by § 3017.355, at the time it entered into a covered transaction with a participant at the next higher tier, you may pursue any remedies available to you, including the initiation of a suspension or debarment action.

Subpart E—Excluded Parties List System

§ 3017.500 What is the purpose of the Excluded Parties List System (EPLS)?

The *EPLS* is a widely available source of the most current information about persons who are excluded or disqualified from covered transactions.

§ 3017.505 Who uses the EPLS?

(a) Federal agency officials use the *EPLS* to determine whether to enter into a transaction with a person, as required under § 3017.430.

(b) Participants also may, but are not required to, use the *EPLS* to determine if—

(1) Principals of their transactions are excluded or disqualified, as required under § 3017.320; or

(2) Persons with whom they are entering into covered transactions at the next lower tier are excluded or disqualified.

(c) The *EPLS* is available to the general public.

§ 3017.510 Who maintains the EPLS?

In accordance with the OMB guidelines, the General Services Administration (GSA) maintains the *EPLS*. When a Federal agency takes an action to exclude a person under the nonprocure-

ment or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

§ 3017.515 What specific information is in the EPLS?

(a) At a minimum, the *EPLS* indicates—

(1) The full name (where available) and address of each excluded or disqualified person, in alphabetical order, with cross references if more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for the action;

(6) The agency and name and telephone number of the agency point of contact for the action; and

(7) The Dun and Bradstreet Number (DUNS), or other similar code approved by the GSA, of the excluded or disqualified person, if available.

(b)(1) The database for the *EPLS* includes a field for the Taxpayer Identification Number (TIN) (the social security number (SSN) for an individual) of an excluded or disqualified person.

(2) Agencies disclose the SSN of an individual to verify the identity of an individual, only if permitted under the Privacy Act of 1974 and, if appropriate, the Computer Matching and Privacy Protection Act of 1988, as codified in 5 U.S.C. 552(a).

§ 3017.520 Who places the information into the EPLS?

Federal officials who take actions to exclude persons under this part or officials who are responsible for identifying disqualified persons must enter the following information about those persons into the *EPLS*:

(a) Information required by § 3017.515(a);

(b) The Taxpayer Identification Number (TIN) of the excluded or disqualified person, including the social security number (SSN) for an individual, if the number is available and may be disclosed under law;

(c) Information about an excluded or disqualified person, generally within five working days, after—

(1) Taking an exclusion action;

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(2) Modifying or rescinding an exclusion action;

(3) Finding that a person is disqualified; or

(4) Finding that there has been a change in the status of a person who is listed as disqualified.

§ 3017.525 Whom do I ask if I have questions about a person in the EPLS?

If you have questions about a person in the *EPLS*, ask the point of contact for the Federal agency that placed the person's name into the *EPLS*. You may find the agency point of contact from the *EPLS*.

§ 3017.530 Where can I find the EPLS?

(a) You may access the *EPLS* through the Internet, currently at <http://epls.arnet.gov>.

(b) As of November 26, 2003, you may also subscribe to a printed version. However, we anticipate discontinuing the printed version. Until it is discontinued, you may obtain the printed

version by purchasing a yearly subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783-3238.

Subpart F—General Principles Relating to Suspension and Debarment Actions

§ 3017.600 How do suspension and debarment actions start?

When we receive information from any source concerning a cause for suspension or debarment, we will promptly report and investigate it. We refer the question of whether to suspend or debar you to our suspending or debarring official for consideration, if appropriate.

§ 3017.605 How does suspension differ from debarment?

Suspension differs from debarment in that—

A suspending official	A debarring official
(a) Imposes suspension as a temporary status of ineligibility for procurement and nonprocurement transactions, pending completion of an investigation or legal proceedings	Imposes debarment for a specified period as a final determination that a person is not presently responsible
(b) Must—	Must conclude, based on a preponderance of the evidence, that the person has engaged in conduct that warrants debarment.
(1) Have adequate evidence that there may be a cause for debarment of a person; and	
(2) Conclude that immediate action is necessary to protect the Federal interest.	
(c) Usually imposes the suspension first, and then promptly notifies the suspended person, giving the person an opportunity to contest the suspension and have it lifted	Imposes debarment after giving the respondent notice of the action and an opportunity to contest the proposed debarment.

§ 3017.610 What procedures does the Department of Agriculture use in suspension and debarment actions?

In deciding whether to suspend or debar you, we handle the actions as informally as practicable, consistent with principles of fundamental fairness.

(a) For suspension actions, we use the procedures in this subpart and subpart G of this part.

(b) For debarment actions, we use the procedures in this subpart and subpart H of this part.

§ 3017.615 How does the Department of Agriculture notify a person of a suspension or debarment action?

(a) The suspending or debarring official sends a written notice to the last known street address, facsimile number, or e-mail address of—

(1) You or your identified counsel; or

(2) Your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers.

(b) The notice is effective if sent to any of these persons.

§ 3017.620 Do Federal agencies coordinate suspension and debarment actions?

Yes, when more than one Federal agency has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their suspension and debarment actions.

§ 3017.625 What is the scope of a suspension or debarment?

If you are suspended or debarred, the suspension or debarment is effective as follows:

(a) Your suspension or debarment constitutes suspension or debarment of all of your divisions and other organizational elements from all covered transactions, unless the suspension or debarment decision is limited—

(1) By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or

(2) To specific types of transactions.

(b) Any affiliate of a participant may be included in a suspension or debarment action if the suspending or debarring official—

(1) Officially names the affiliate in the notice; and

(2) Gives the affiliate an opportunity to contest the action.

§ 3017.630 May the Department of Agriculture impute conduct of one person to another?

For purposes of actions taken under this rule, we may impute conduct as follows:

(a) *Conduct imputed from an individual to an organization.* We may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits

derived from the conduct is evidence of knowledge, approval or acquiescence.

(b) *Conduct imputed from an organization to an individual, or between individuals.* We may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, had knowledge of, or reason to know of the improper conduct.

(c) *Conduct imputed from one organization to another organization.* We may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

§ 3017.635 May the Department of Agriculture settle a debarment or suspension action?

Yes, we may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.

§ 3017.640 May a settlement include a voluntary exclusion?

Yes, if we enter into a settlement with you in which you agree to be excluded, it is called a voluntary exclusion and has governmentwide effect.

§ 3017.645 Do other Federal agencies know if the Department of Agriculture agrees to a voluntary exclusion?

(a) Yes, we enter information regarding a voluntary exclusion into the EPLS.

(b) Also, any agency or person may contact us to find out the details of a voluntary exclusion.

§ 3017.620 Do Federal agencies coordinate suspension and debarment actions?

Yes, when more than one Federal agency has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their suspension and debarment actions.

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(a) Your suspension or debarment constitutes suspension or debarment of all of your divisions and other organizational elements from all covered transactions, unless the suspension or debarment decision is limited--

(1) By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or

(2) To specific types of transactions.

(b) Any affiliate of a participant may be included in a suspension or debarment action if the suspending or debarring official--

(1) Officially names the affiliate in the notice; and

(2) Gives the affiliate an opportunity to contest the action.

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For purposes of actions taken under this rule, we may impute conduct as follows:

(a) *Conduct imputed from an individual to an organization.* We may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits

derived from the conduct is evidence of knowledge, approval or acquiescence.

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Yes, if we enter into a settlement with you in which you agree to be excluded, it is called a voluntary exclusion and has governmentwide effect.

§ 3017.645 Do other Federal agencies know if the Department of Agriculture agrees to a voluntary exclusion?

(a) Yes, we enter information regarding a voluntary exclusion into the EPLS.

(b) Also, any agency or person may contact us to find out the details of a voluntary exclusion.

Subpart G—Suspension

§ 3017.700 When may the suspending official issue a suspension?

Suspension is a serious action. Using the procedures of this subpart and subpart F of this part, the suspending official may impose suspension only when that official determines that—

- (a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under § 3017.800(a), or
- (b) There exists adequate evidence to suspect any other cause for debarment listed under § 3017.800(b) through (d); and
- (c) Immediate action is necessary to protect the public interest.

§ 3017.705 What does the suspending official consider in issuing a suspension?

(a) In determining the adequacy of the evidence to support the suspension, the suspending official considers how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. During this assessment, the suspending official may examine the basic documents, including grants, cooperative agreements, loan authorizations, contracts, and other relevant documents.

(b) An indictment, conviction, civil judgment, or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.

(c) In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. For example, the suspending official may infer the necessity for immediate action to protect the public interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government.

§ 3017.710 When does a suspension take effect?

A suspension is effective when the suspending official signs the decision to suspend.

§ 3017.715 What notice does the suspending official give me if I am suspended?

After deciding to suspend you, the suspending official promptly sends you a Notice of Suspension advising you—

- (a) That you have been suspended;
- (b) That your suspension is based on—
 - (1) An indictment;
 - (2) A conviction;
 - (3) Other adequate evidence that you have committed irregularities which seriously reflect on the propriety of further Federal Government dealings with you; or
 - (4) Conduct of another person that has been imputed to you, or your affiliation with a suspended or debarred person;
- (c) Of any other irregularities in terms sufficient to put you on notice without disclosing the Federal Government's evidence;
- (d) Of the cause(s) upon which we relied under § 3017.700 for imposing suspension;
- (e) That your suspension is for a temporary period pending the completion of an investigation or resulting legal or debarment proceedings;
- (f) Of the applicable provisions of this subpart, Subpart F of this part, and any other Department of Agriculture procedures governing suspension decision making; and
- (g) Of the governmentwide effect of your suspension from procurement and nonprocurement programs and activities.

§ 3017.720 How may I contest a suspension?

If you as a respondent wish to contest a suspension, you or your representative must provide the suspending official with information in opposition to the suspension. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

§ 3017.725 How much time do I have to contest a suspension?

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the

information and argument to the suspending official within 30 days after you receive the Notice of Suspension.

(b) We consider the notice to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

§ 3017.730 What information must I provide to the suspending official if I contest a suspension?

(a) In addition to any information and argument in opposition, as a respondent your submission to the suspending official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Suspension that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the Department of Agriculture may seek further criminal, civil or administrative action against you, as appropriate.

§ 3017.735 Under what conditions do I get an additional opportunity to challenge the facts on which the suspension is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the suspending official determines that—

(1) Your suspension is based upon an indictment, conviction, civil judgment, or other finding by a Federal, State, or local body for which an opportunity to contest the facts was provided;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Suspension;

(3) The issues raised in your presentation in opposition to the suspension are not factual in nature, or are not material to the suspending official's initial decision to suspend, or the official's decision whether to continue the suspension; or

(4) On the basis of advice from the Department of Justice, an office of the United States Attorney, a State attorney general's office, or a State or local prosecutor's office, that substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced by conducting fact-finding.

(b) You will have an opportunity to challenge the facts if the suspending official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the suspension.

(c) If you have an opportunity to challenge disputed material facts under this section, the suspending official or designee must conduct additional proceedings to resolve those facts.

§ 3017.740 Are suspension proceedings formal?

(a) Suspension proceedings are conducted in a fair and informal manner. The suspending official may use flexible procedures to allow you to present matters in opposition. In so doing, the suspending official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base a final suspension decision.

(b) You as a respondent or your representative must submit any documentary evidence you want the suspending official to consider.

§ 3017.745 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

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(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the Department of Agriculture agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

§ 3017.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?

(a) The suspending official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the suspending official's initial decision to suspend you;

(2) Any further information and argument presented in support of, or opposition to, the suspension; and

(3) Any transcribed record of fact-finding proceedings.

(b) The suspending official may refer disputed material facts to another official for findings of fact. The suspending official may reject any resulting findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

§ 3017.755 When will I know whether the suspension is continued or terminated?

The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record. The official record closes upon the suspending official's receipt of final submissions, information and findings of fact, if any. The suspending official may extend that period for good cause. However, the record will remain open for the full 30 days, as called for in § 3017.725, even when you make a submission before the 30 days expire.

[68 FR 66544, 66563, Nov. 26, 2003, as amended at 68 FR 66565, Nov. 26, 2003]

§ 3017.760 How long may my suspension last?

(a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may

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continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.

(b) The suspending official may extend the 12 month limit under paragraph (a) of this section for an additional 6 months if an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under paragraph (a) of this section.

(c) The suspending official must notify the appropriate officials under paragraph (b) of this section of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

§ 3017.765 How may I appeal my suspension?

(a) You may file an appeal only after you have exhausted the option provided for in § 3017.720 to contest the suspension. You must file your appeal within 30 days of receiving the decision required by § 3017.755 and your filing must specify the basis of the appeal. You must submit your appeal in writing to the Hearing Clerk in the Office of Administrative Law Judges (OALJ), United States Department of Agriculture (USDA), Washington, DC 20250. The assigned appeals officer may vacate the decision of the suspending official only if the officer determines that the decision is

(1) Not in accordance with law;

(2) Not based on the applicable standard of evidence; or

(3) Arbitrary and capricious and an abuse of discretion.

(b) The appeals officer will base the decision solely on the administrative record.

(c) Within 90 days of the date that you file your appeal with USDA's OALJ Hearing Clerk, the appeals officer will give written notification of the decision to you and to the suspending official who took the action being appealed.

(d) The appeals officer's decision is final and is not appealable within USDA.

[68 FR 66565, Nov. 26, 2003]

Subpart H—Debarment

§ 3017.800 What are the causes for debarment?

We may debar a person for—

(a) Conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State anti-trust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;

(2) Knowingly doing business with an ineligible person, except as permitted under § 3017.120;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 3017.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

(e) Notwithstanding paragraph (c) (1) of this section, within the Department of Agriculture a nonprocurement debarment by any Federal agency taken before March 1, 1989

[68 FR 66544, 66563, Nov. 26, 2003, as amended at 68 FR 66565, Nov. 26, 2003]

§ 3017.805 What notice does the debarring official give me if I am proposed for debarment?

After consideration of the causes in § 3017.800 of this subpart, if the debarring official proposes to debar you, the official sends you a Notice of Proposed Debarment, pursuant to § 3017.615, advising you—

(a) That the debarring official is considering debarring you;

(b) Of the reasons for proposing to debar you in terms sufficient to put you on notice of the conduct or transactions upon which the proposed debarment is based;

(c) Of the cause(s) under § 3017.800 upon which the debarring official relied for proposing your debarment;

(d) Of the applicable provisions of this subpart, Subpart F of this part, and any other Department of Agriculture procedures governing debarment; and

(e) Of the governmentwide effect of a debarment from procurement and nonprocurement programs and activities

§3017.810

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§3017.810 When does a debarment take effect?

A debarment is not effective until the debarring official issues a decision. The debarring official does not issue a decision until the respondent has had an opportunity to contest the proposed debarment.

§3017.815 How may I contest a proposed debarment?

If you as a respondent wish to contest a proposed debarment, you or your representative must provide the debarring official with information in opposition to the proposed debarment. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

§3017.820 How much time do I have to contest a proposed debarment?

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the debarring official within 30 days after you receive the Notice of Proposed Debarment.

(b) We consider the Notice of Proposed Debarment to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

§3017.825 What information must I provide to the debarring official if I contest a proposed debarment?

(a) In addition to any information and argument in opposition, as a respondent your submission to the debarring official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Proposed Debarment. Include any information about any of the factors listed in §3017.860. A general denial is insufficient to raise a genuine dispute over facts material to the debarment;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Proposed Debarment that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates

(b) If you fail to disclose this information, or provide false information, the Department of Agriculture may seek further criminal, civil or administrative action against you, as appropriate.

§3017.830 Under what conditions do I get an additional opportunity to challenge the facts on which a proposed debarment is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the debarring official determines that—

(1) Your debarment is based upon a conviction or civil judgment;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Proposed Debarment; or

(3) The issues raised in your presentation in opposition to the proposed debarment are not factual in nature, or are not material to the debarring official's decision whether to debar.

(b) You will have an additional opportunity to challenge the facts if the debarring official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the proposed debarment.

(c) If you have an opportunity to challenge disputed material facts under this section, the debarring official or designee must conduct additional proceedings to resolve those facts.

§3017.835 Are debarment proceedings formal?

(a) Debarment proceedings are conducted in a fair and informal manner. The debarring official may use flexible

procedures to allow you as a respondent to present matters in opposition. In so doing, the debarring official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base the decision whether to debar.

(b) You or your representative must submit any documentary evidence you want the debarring official to consider.

§ 3017.840 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the Department of Agriculture agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

§ 3017.845 What does the debarring official consider in deciding whether to debar me?

(a) The debarring official may debar you for any of the causes in § 3017.800. However, the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating or aggravating factors set forth at § 3017.860.

(b) The debarring official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the debarring official's proposed debarment;

(2) Any further information and argument presented in support of, or in opposition to, the proposed debarment; and

(3) Any transcribed record of fact-finding proceedings.

(c) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

§ 3017.850 What is the standard of proof in a debarment action?

(a) In any debarment action, we must establish the cause for debarment by a preponderance of the evidence.

(b) If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.

§ 3017.855 Who has the burden of proof in a debarment action?

(a) We have the burden to prove that a cause for debarment exists.

(b) Once a cause for debarment is established, you as a respondent have the burden of demonstrating to the satisfaction of the debarring official that you are presently responsible and that debarment is not necessary.

§ 3017.860 What factors may influence the debarring official's decision?

This section lists the mitigating and aggravating factors that the debarring official may consider in determining whether to debar you and the length of your debarment period. The debarring official may consider other factors if appropriate in light of the circumstances of a particular case. The existence or nonexistence of any factor, such as one of those set forth in this section, is not necessarily determinative of your present responsibility. In making a debarment decision, the debarring official may consider the following factors:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.

(d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to

§ 3017.865

one or more of the causes for debarment specified in this part.

(e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.

(f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

(g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.

(h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

(j) Whether the wrongdoing was pervasive within your organization.

(k) The kind of positions held by the individuals involved in the wrongdoing.

(l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(m) Whether your principals tolerated the offense.

(n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the

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individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.

§ 3017.865 How long may my debarment last?

(a) If the debarring official decides to debar you, your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.

(b) In determining the period of debarment, the debarring official may consider the factors in § 3017.860. If a suspension has preceded your debarment, the debarring official must consider the time you were suspended.

(c) If the debarment is for a violation of the provisions of the Drug-Free Workplace Act of 1988, your period of debarment may not exceed five years.

§ 3017.870 When do I know if the debarring official debars me?

(a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause. However, the record will remain open for the full 30 days, as called for in § 3017.820, even when you make a submission before the 30 days expire.

(b) The debarring official sends you written notice, pursuant to § 3017.615 that the official decided, either--

(1) Not to debar you; or

(2) To debar you. In this event, the notice:

(i) Refers to the Notice of Proposed Debarment;

(ii) Specifies the reasons for your debarment;

(iii) States the period of your debarment, including the effective dates, and

(iv) Advises you that your debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception.

[68 FR 66544, 66563, Nov. 26, 2003, as amended at 68 FR 66565, Nov. 26, 2003]

§ 3017.875 May I ask the debarring official to reconsider a decision to debar me?

Yes, as a debarred person you may ask the debarring official to reconsider the debarment decision or to reduce the time period or scope of the debarment. However, you must put your request in writing and support it with documentation.

§ 3017.880 What factors may influence the debarring official during reconsideration?

The debarring official may reduce or terminate your debarment based on—

- (a) Newly discovered material evidence;
- (b) A reversal of the conviction or civil judgment upon which your debarment was based;
- (c) A bona fide change in ownership or management;
- (d) Elimination of other causes for which the debarment was imposed; or
- (e) Other reasons the debarring official finds appropriate.

§ 3017.885 May the debarring official extend a debarment?

(a) Yes, the debarring official may extend a debarment for an additional period, if that official determines that an extension is necessary to protect the public interest.

(b) However, the debarring official may not extend a debarment solely on the basis of the facts and circumstances upon which the initial debarment action was based.

(c) If the debarring official decides that a debarment for an additional period is necessary, the debarring official must follow the applicable procedures

in this subpart, and subpart F of this part, to extend the debarment.

§ 3017.890 How may I appeal my debarment?

(a) You may file an appeal only after you have exhausted the option provided for in § 3017.815 to contest the debarment. You must file your appeal within 30 days of receiving the decision required by § 3017.870 and your filing must specify the basis of the appeal. You must submit your appeal in writing to the Hearing Clerk in the Office of Administrative Law Judges (OALJ), United States Department of Agriculture (USDA), Washington, DC 20250. The assigned appeals officer may vacate the decision of the debarring official only if the officer determines that the decision is:

- (1) Not in accordance with law;
 - (2) Not based on the applicable standard of evidence; or
 - (3) Arbitrary and capricious and an abuse of discretion.
- (b) The appeals officer will base the decision solely on the administrative record.

(c) Within 90 days of the date that you file your appeal with USDA's OALJ Hearing Clerk, the appeals officer will give written notification of the decision to you and to the debarring official who took the action being appealed.

(d) The appeals officer's decision is final and is not appealable within USDA.

[68 FR 66565, Nov. 26, 2003]

Subpart I—Definitions

§ 3017.900 Adequate evidence.

Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

§ 3017.905 Affiliate.

Persons are *affiliates* of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways we use to determine control include, but are not limited to—

(iii) States the period of your debarment, including the effective dates; and

(iv) Advises you that your debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception.

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§ 3017.910

(a) Interlocking management or ownership;

(b) Identity of interests among family members;

(c) Shared facilities and equipment;

(d) Common use of employees; or

(e) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

§ 3017.910 Agency.

Agency means any United States executive department, military department, defense agency, or any other agency of the executive branch. Other agencies of the Federal government are not considered "agencies" for the purposes of this part unless they issue regulations adopting the governmentwide Debarment and Suspension system under Executive orders 12549 and 12689.

§ 3017.915 Agent or representative.

Agent or representative means any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction.

§ 3017.920 Civil judgment.

Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-3812).

§ 3017.925 Conviction.

Conviction means—

(a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of *nolo contendere*; or

(b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

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§ 3017.930 Debarment.

Debarment means an action taken by a debarring official under subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter I). A person so excluded is debarred.

§ 3017.935 Debarring official.

(a) *Debarring official* means an agency official who is authorized to impose debarment. A debarring official is either—

(1) The agency head; or

(2) An official designated by the agency head.

(b) The head of an organizational unit within the Department of Agriculture (e.g., Administrator, Food and Nutrition Service), who has been delegated authority in part 2 of this title to carry out a covered transaction, is delegated authority to act as the debarring official in connection with such transaction. This authority to act as a debarring official may not be redelegated below the head of the organizational unit, except that, in the case of the Forest Service, the Chief may redelegate the authority to act as a debarring official to the Deputy Chief or an Associate Deputy Chief for the National Forest System.

[68 FR 66544, 66563, Nov. 26, 2003, as amended at 68 FR 66565, Nov. 26, 2003]

§ 3017.940 Disqualified.

Disqualified means that a person is prohibited from participating in specified Federal procurement or non-procurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under—

(a) The Davis-Bacon Act (40 U.S.C. 276(a));

(b) The equal employment opportunity acts and Executive orders; or

(c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799).

§ 3017.945 Excluded or exclusion.

Excluded or exclusion means—

(a) That a person or commodity is prohibited from being a participant in covered transactions, whether the person has been suspended; debarred; proposed for debarment under 48 CFR part 9, subpart 9.4; voluntarily excluded; or

(b) The act of excluding a person.

§ 3017.950 Excluded Parties List System

Excluded Parties List System (EPLS) means the list maintained and disseminated by the General Services Administration (GSA) containing the names and other information about persons who are ineligible. The *EPLS* system includes the printed version entitled, "List of Parties Excluded or Disqualified from Federal Procurement and Nonprocurement Programs," so long as published.

§ 3017.955 Indictment.

Indictment means an indictment for a criminal offense. A presentment, information, or other filing by a competent authority charging a criminal offense shall be given the same effect as an indictment.

§ 3017.960 Ineligible or ineligibility.

Ineligible or ineligibility means that a person or commodity is prohibited from covered transactions because of an exclusion or disqualification.

§ 3017.965 Legal proceedings.

Legal proceedings means any criminal proceeding or any civil judicial proceeding, including a proceeding under the Program Fraud Civil Remedies Act (31 U.S.C. 3801-3812), to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term also includes appeals from those proceedings.

§ 3017.970 Nonprocurement transaction.

(a) *Nonprocurement transaction* means any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

- (1) Grants.
- (2) Cooperative agreements.
- (3) Scholarships.
- (4) Fellowships.
- (5) Contracts of assistance.
- (6) Loans.

(7) Loan guarantees.

(8) Subsidies.

(9) Insurances.

(10) Payments for specified uses.

(11) Donation agreements.

(b) A nonprocurement transaction at any tier does not require the transfer of Federal funds.

§ 3017.975 Notice.

Notice means a written communication served in person, sent by certified mail or its equivalent, or sent electronically by e-mail or facsimile. (See § 3017.615.)

§ 3017.980 Participant.

Participant means any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant.

§ 3017.985 Person.

Person means any individual, corporation, partnership, association, unit of government, or legal entity, however organized.

§ 3017.990 Preponderance of the evidence.

Preponderance of the evidence means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.

§ 3017.995 Principal.

Principal means—

(a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or

(b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—

(1) Is in a position to handle Federal funds;

(2) Is in a position to influence or control the use of those funds; or,

(3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.

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§ 3017.1000 Respondent.

Respondent means a person against whom an agency has initiated a debarment or suspension action.

§ 3017.1005 State.

(a) *State* means—

(1) Any of the states of the United States;

(2) The District of Columbia;

(3) The Commonwealth of Puerto Rico;

(4) Any territory or possession of the United States; or

(5) Any agency or instrumentality of a state.

(b) For purposes of this part, *State* does not include institutions of higher education, hospitals, or units of local government.

§ 3017.1010 Suspending official.

(a) *Suspending official* means an agency official who is authorized to impose suspension. The suspending official is either:

(1) The agency head; or

(2) An official designated by the agency head.

(b) The head of an organizational unit within the Department of Agriculture (e.g., Administrator, Food and Nutrition Service), who has been delegated authority in part 2 of this title to carry out a covered transaction, is delegated authority to act as the suspending official in connection with such transaction. This authority to act

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as a suspending official may not be re-delegated below the head of the organizational unit, except that, in the case of the Forest Service, the Chief may re-delegate the authority to act as a suspending official to the Deputy Chief or an Associate Deputy Chief for the National Forest System.

[68 FR 66341, 66563, Nov. 26, 2003, as amended at 68 FR 66363, Nov. 26, 2003]

§ 3017.1015 Suspension.

Suspension is an action taken by a suspending official under subpart G of this part that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.

§ 3017.1020 Voluntary exclusion or voluntarily excluded.

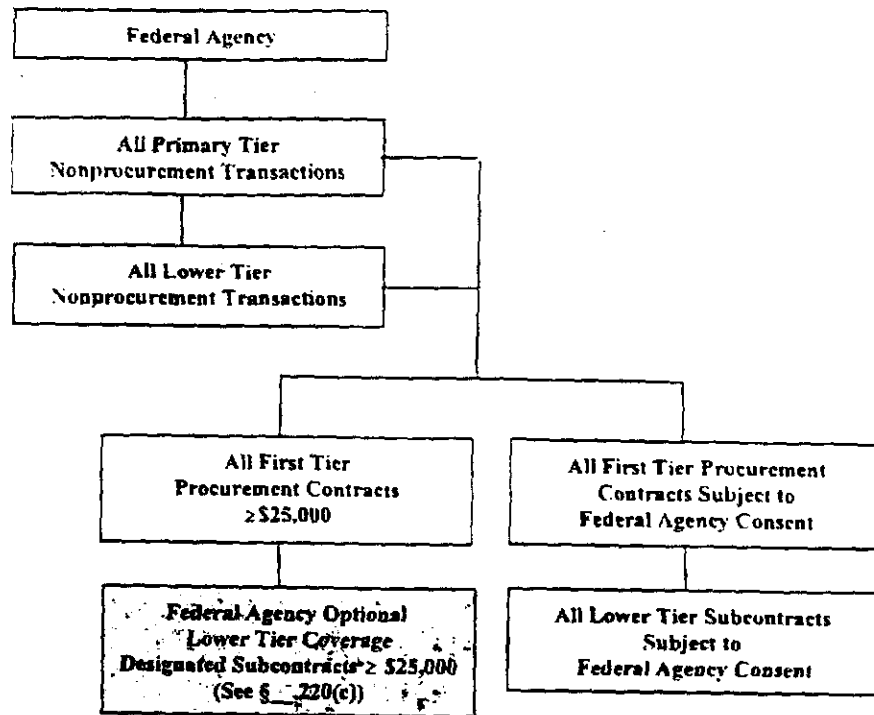
(a) *Voluntary exclusion* means a person's agreement to be excluded under the terms of a settlement between the person and one or more agencies. Voluntary exclusion must have governmentwide effect.

(b) *Voluntarily excluded* means the status of a person who has agreed to a voluntary exclusion.

Subpart J [Reserved]

APPENDIX TO PART 3017—COVERED TRANSACTIONS

COVERED TRANSACTIONS



PART 3018—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

- Sec.
 3018.100 Conditions on use of funds.
 3018.105 Definitions.
 3018.110 Certification and disclosure.

Subpart B—Activities by Own Employees

- 3018.200 Agency and legislative liaison
 3018.205 Professional and technical services
 3018.210 Reporting.

Subpart C—Activities by Other Than Own Employees

- 3018.300 Professional and technical services.

Subpart D—Penalties and Enforcement

- 3018.400 Penalties.
 3018.405 Penalty procedures
 3018.410 Enforcement.

Subpart E—Exemptions

- 3018.500 Secretary of Defense.

Subpart F—Agency Reports

- 3018.600 Semi-annual compilation.
 3018.605 Inspector General report.

APPENDIX A TO PART 3018—CERTIFICATION REGARDING LOBBYING

APPENDIX B TO PART 3018—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Sec. 319, Pub. L. 101-121 (31 U.S.C. 1352); 5 U.S.C. 301.

SOURCE: 55 FR 6737 and 6746, Feb. 26, 1990.

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**PART 3021—GOVERNMENTWIDE
REQUIREMENTS FOR DRUG-FREE
WORKPLACE (FINANCIAL ASSISTANCE)**

Subpart A—Purpose and Coverage

Sec.

3021.100 What does this part do?

3021.105 Does this part apply to me?

3021.110 Are any of my Federal assistance awards exempt from this part?

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***Subpart B—Requirements for Recipients
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§ 3021.200

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- 3021.660 Recipient.
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If you are . . .	see subparts . . .
(1) A recipient who is not an individual	A, B and E
(2) A recipient who is an individual	A, C and E
(3) A(n) Department of Agriculture awarding official	A, D and E

§ 3021.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the Secretary of Agriculture or designee determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

§ 3021.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 3021.510(c). However, this part does not apply directly to procurement con-

3021.670 Suspension.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 701 *et seq.*; Pub. L. 101-576, 104 Stat. 2838, 7 CFR § 2.28

SOURCE: 68 FR 66557, 66565, Nov. 26, 2003, unless otherwise noted.

Subpart A—Purpose and Coverage

§ 3021.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

§ 3021.105 Does this part apply to me?

- (a) Portions of this part apply to you if you are either—
- (1) A recipient of an assistance award from the Department of Agriculture; or
 - (2) A(n) Department of Agriculture awarding official. (See definitions of award and recipient in §§ 3021.605 and 3021.660, respectively.)
- (b) The following table shows the subparts that apply to you:

tracts The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

Subpart B—Requirements for Recipients Other Than Individuals

§ 3021.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

§ 3021.205

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(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 3021.205 through 3021.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 3021.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 3021.230).

§ 3021.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a

criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

§ 3021.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 3021.205 be given to each employee who will be engaged in the performance of any Federal award.

§ 3021.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

§ 3021.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 3021.205 and an ongoing awareness program as described in § 3021.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	Then you . . .
(a) The performance period of the award is less than 30 days	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more	must have the policy statement and program in place within 30 days after award.
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program	may ask the Department of Agriculture awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

§ 3021.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 3021.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either—

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

§ 3021.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each Department of Agriculture award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces—

(1) To the Department of Agriculture official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by Department of Agriculture officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the Department of Agriculture awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the Department of Agriculture awarding official.

Subpart C—Requirements for Recipients Who Are Individuals

§ 3021.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a(n) Department of Agriculture award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction;

(1) In writing;

(2) Within 10 calendar days of the conviction.

(3) To the Department of Agriculture awarding official or other designee for each award that you currently have, unless § 3021.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

§ 3021.301 [Reserved]

Subpart D—Responsibilities of Department of Agriculture Awarding Officials

§ 3021.400 What are my responsibilities as a(n) Department of Agriculture awarding official?

As a(n) Department of Agriculture awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

§ 3021.500

(b) Subpart C of this part, if the recipient is an individual.

Subpart E—Violations of this Part and Consequences

§ 3021.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the the Secretary of Agriculture or designee determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

§ 3021.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the the Secretary of Agriculture or designee determines, in writing, that—

(a) The recipient has violated the requirements of subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

§ 3021.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in § 3021.500 or § 3021.505, the Department of Agriculture may take one or more of the following actions—

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 7 CFR part 3017, for a period not to exceed five years.

[68 FR 66557, 66565, Nov. 26, 2003, as amended at 68 FR 66566, Nov. 26, 2003]

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§ 3021.515 Are there any exceptions to those actions?

The the Secretary of Agriculture may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the the Secretary of Agriculture determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

Subpart F—Definitions

§ 3021.605 Award.

Award means an award of financial assistance by the Department of Agriculture or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 7 CFR part 3016 that implements OMB Circular A-102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

[68 FR 66557, 66565, Nov. 26, 2003, as amended at 68 FR 66566, Nov. 26, 2003]

§ 3021.610 Controlled substance.

Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

§ 3021.615 Conviction.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

§ 3021.620 Cooperative agreement.

Cooperative agreement means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in § 3021.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

§ 3021.625 Criminal drug statute.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

§ 3021.630 Debarment.

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

§ 3021.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

§ 3021.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

§ 3021.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

§ 3021.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

§ 3021.655 Individual.

Individual means a natural person.

§ 3021.660

§ 3021.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

§ 3021.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 3021.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered non-procurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Non-procurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

PART 3052—AUDITS OF STATES, LOCAL GOVERNMENTS, AND NON-PROFIT ORGANIZATIONS

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AUTHORITY: 5 U.S.C. 301

SOURCE: 62 FR 45949, Aug. 29, 1997, unless otherwise noted.

Subpart A—General

§ 3052.100 Purpose.

This part sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards.

§ 3052.105 Definitions.

Audit finding means deficiencies which the auditor is required by § 3052.510(a) to report in the schedule of findings and questioned costs.

Auditee means any non-Federal entity that expends Federal awards which must be audited under this part.

Auditor means an auditor, that is a public accountant or a Federal, State or local government audit organization, which meets the general standards specified in generally accepted government auditing standards (GAGAS). The term auditor does not include internal auditors of non-profit organizations.

CFDA number means the number assigned to a Federal program in the Catalog of Federal Domestic Assistance (CFDA)

Cluster of programs means a grouping of closely related programs that share common compliance requirements. The